Appendix A

ALD-004 **NOT PRECEDENTIAL**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-2098

DAVID ANTOINE LUSTER,
Appellant

v.

WARDEN MCKEAN FCI

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil Action No. 1-19-cv-00012)
District Judge: Honorable Susan Paradise Baxter

Submitted for Possible Dismissal Pursuant to 28 U.S.C. § 1915(e)(2)(B) or
Summary Action Pursuant to Third Circuit LAR 27.4 and I.O.P. 10.6
October 1, 2020

Before: MCKEE, GREENAWAY, JR., and BIBAS, Circuit Judges

(Opinion filed: December 8, 2020)

OPINION*

PER CURIAM

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* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

Pro se appellant David Antoine Luster appeals the District Court's dismissal of his habeas petition filed pursuant to 28 U.S.C. § 2241. Because the appeal fails to present a substantial question, we will summarily affirm the District Court's judgment. See 3d Cir. L.A.R. 27.4; 3d Cir. I.O.P. 10.6.

Luster, a federal prisoner currently confined at FCI McKean in Pennsylvania, entered a guilty plea in the United States District Court for the Middle District of Georgia in five separate cases to eight counts of bank robbery in violation of 18 U.S.C. § 2113(a) and (d) (counts I and III), and two counts of using or carrying a firearm during a crime of violence in violation of 18 U.S.C. § 924(c) (counts II and IV). He was sentenced to 535 months' imprisonment, which included a mandatory 25-year consecutive sentence on the second § 924(c) conviction. The Eleventh Circuit Court of Appeals affirmed Luster's judgment of sentence on direct appeal. See United States v. Luster, 129 F. App'x 598 (11th Cir. 2005) (table); 129 F. App'x 599 (11th Cir. 2005) (table).

Since then, Luster has sought to collaterally attack his conviction and sentence numerous times, including by filing five motions to vacate his sentence pursuant to 28 U.S.C. § 2255, 10 motions to file a second or successive § 2255 motion pursuant to 28 U.S.C. §§ 2244 and 2255(h), and five prior § 2241 petitions. See Mag. J. R. & R. at 2. In January 2019, he filed the § 2241 petition at issue here, arguing that his sentence on the second § 924(c) conviction was invalidated by the First Step Act of 2018. In an addendum to that petition, he asserted that he was actually innocent of the § 924(c) convictions, and that his judgment of restitution is null and void, pursuant to the Supreme

Court's decision in Sessions v. Dimaya, 138 S. Ct. 1204 (2018). The District Court dismissed the petition for lack of jurisdiction, and this appeal ensued.

We have appellate jurisdiction pursuant to 28 U.S.C. § 1291. In reviewing the District Court's dismissal of the § 2241 petition, we exercise plenary review over its legal conclusions and review its factual findings for clear error. See Cradle v. United States ex rel. Miner, 290 F.3d 536, 538 (3d Cir. 2002) (per curiam).

Generally, the execution or carrying out of an initially valid confinement is within the purview of a § 2241 proceeding, as attacks on the validity of a conviction or sentence must be asserted under § 2255. See Coady v. Vaughn, 251 F.3d 480, 485 (3d Cir.2001); Okereke v. United States, 307 F.3d 117, 120 (3d Cir. 2002). Luster may not pursue a collateral attack on his conviction and sentence by way of § 2241 unless he can show that "the remedy by [§ 2255] motion is inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e). Under this "safety valve" provision, a prior unsuccessful § 2255 motion or the inability to meet the statute's stringent gatekeeping requirements does not render § 2255 inadequate or ineffective. See In re Dorsainvil, 119 F.3d 245, 251 (3d Cir. 1997). Rather, the exception is narrow, limited to extraordinary circumstances such as where the petitioner "had no earlier opportunity" to present his claims and has been convicted for conduct which is no longer deemed criminal. Id.

Luster challenges the validity of his conviction and sentence on count IV, the second § 924(c) conviction, in light of the First Step Act (FSA), Pub. L. No. 115-391, 132 Stat. 5194 (2018). Specifically, he relies on § 403(a) of the FSA, which removed the

mandatory 25-year sentence for a second or subsequent § 924(c) offense committed before the first § 924(c) conviction was final. See id. at § 403(a), 132 Stat. at 5222. Contrary to his argument on appeal, prior to the FSA, a defendant like Luster who was convicted of multiple § 924(c) convictions in a single prosecution was subject to a 25-year sentence on the second or subsequent violation. See United States v. Davis, 139 S. Ct. 2319, 2324 n.1 (2019) (citing Deal v. United States, 508 U.S. 129, 132 (1993)).

Luster reasons that he should be allowed to seek relief on his FSA claim under § 2241's "saving[s] clause" because Congress "merely clarified" the meaning of § 924(c), making clear that his conviction and sentence on count IV were void ab initio. For support, he relies on Fiore v. White, 531 U.S. 225, 228 (2001), in which the Supreme Court held that a defendant's conviction violated due process where a subsequent Pennsylvania Supreme Court decision interpreting the criminal statute clarified that the conduct for which he was convicted was not criminal. As the District Court explained here, the FSA did not decriminalize the conduct for which Luster was convicted. Moreover, § 403(a) of the FSA does not apply retroactively to defendants, like Luster, who were convicted and sentenced prior to its enactment. See Pub. L. No. 115-391, 403(b) (applying the change only to "any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment"); United States v. Hodge, 948 F.3d 160, 163 (3d Cir. 2020). Accordingly, even assuming this type of innocence-of-the-sentence claim may be properly asserted in a § 2241 proceeding, see generally United States v. Doe, 810 F.3d 132, 160-61 (3d Cir.

2015), this claim does not otherwise satisfy the conditions required to proceed under the savings clause of § 2255(e). See Bruce v. Warden Lewisburg USP, 868 F.3d 170, 177-80 (3d Cir. 2017) (noting that the saving clause applies "when there is a change in statutory caselaw that applies retroactively in cases on collateral review.").

Luster also challenges the validity of his § 924 convictions (and resulting sentence) under Dimaya, in which the Supreme Court held that the definition of a "crime of violence" in 18 U.S.C. § 16(b) is unconstitutionally vague.[1] See 138 S. Ct. at 1213. Luster argues that because the essential text of § 16(b) is replicated in the definition of "crime of violence" set forth in § 924(c)(3)(B), that provision is also void for vagueness, and his convictions are therefore unconstitutional. After Dimaya, the Supreme Court held that § 924(c)(3)(B) is unconstitutionally vague. See Davis, 139 S. Ct. at 2336. But this is clearly not a situation in which Luster "had no earlier opportunity to challenge his conviction[s]" based on this claim. Dorsainvil, 119 F.3d at 251. This is precisely the type of constitutional claim that can be pursued in a second or successive § 2255 motion, and, indeed, Luster presented it to the Eleventh Circuit in a § 2244 application, prior to the decision in Davis. That Court denied authorization to file a second or

[1] Pertinent here, § 924(c) "authorizes heightened criminal penalties for using or carrying a firearm 'during and in relation to,' or possessing a firearm 'in furtherance of,' any federal 'crime of violence.'" Davis, 139 S. Ct. at 2324. The statute defines "crime of violence" as an offense that either "(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 924(c)(3).

successive § 2255 motion; it concluded that, although Luster's convictions may not be valid under § 924(c)(3)(B) (the residual clause), armed robbery is a crime of violence under 924(c)(3)(A) (the elements clause). See Judgment Order, C.A. No. 18-11799 (11th Cir. Nov. 9, 2018) (citing In re Hines, 824 F.3d 1334, 1337 (11th Cir. 2016)); accord United States v. Johnson, 899 F.3d 191, 204 (3d Cir. 2018). The mere fact that Luster's § 2244 application was denied does not render § 2555 inadequate or ineffective. See Gardner v. Warden Lewisburg USP, 845 F.3d 99, 102 (3d Cir. 2017).[2]

For the foregoing reasons, the District Court correctly ruled that it lacked jurisdiction to entertain the § 2241 petition. Accordingly, because no "substantial question" is presented as to the petition's dismissal, we will summarily affirm the judgment of the District Court. See 3d Cir. LAR 27.4; 3d Cir. I.O.P. 10.6. Luster's motion to expedite the appeal is denied.[3]

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[2] To the extent Luster also sought to challenge his § 924(c) convictions based on decisions rendered by the First and Ninth Circuit courts of appeals, the claim does not fit within the Dorsainvil exception because the opinions he cites do not present a change in substantive law and are not controlling on this Court.

[3] Luster sought expedited consideration of his appeal based on his erroneous belief that his appeal was meritorious, and in light of the impact of the COVID-19 pandemic on prison facilities. We note that Luster has made clear that he is not seeking compassionate release, see 18 U.S.C. § 3582(c)(1)(A)(i).

ALD-004

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Summary Action Pursuant to Third Circuit LAR 27.4 and I.O.P. 10.6
October 1, 2020

Before: MCKEE, GREENAWAY, JR., and BIBAS, Circuit Judges

JUDGMENT

This cause came to be considered on the record from the United States District Court for the Western District of Pennsylvania and was submitted for possible dismissal pursuant to 28 U.S.C. § 1915(e)(2)(B) and for possible summary action pursuant to Third Circuit LAR 27.4 and I.O.P. 10.6 on October 1, 2020. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the judgment of the District Court entered May 14, 2020, be and the same hereby is affirmed. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

DATED: December 8, 2020

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DAVID ANTOINE LUSTER,	)	
	)	Civil Action No. 1:19-cv-12
Petitioner,	)	
	)	
v.	)	Magistrate Judge Richard A. Lanzillo
	)	
WARDEN TRATE,	)	(Filed Electronically)
	)	
Respondent.	)	

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

AND NOW, comes the Warden, Bradley Trate ("Respondent") of Federal Correctional Center ("FCI") McKean, by and through Scott W. Brady, United States Attorney for the Western District of Pennsylvania, and Karen Gal-Or, Assistant United States Attorney for said district, and hereby submits the following Response to Petitioner David Antoine Luster's Petition for Writ of Habeas Corpus, and in support thereof states the following:

BACKGROUND

David Luster ("Luster" or "Petitioner"), an inmate presently confined at FCI McKean filed this *pro se* habeas corpus petition pursuant to 28 U.S.C. § 2241. In 2004, Luster pleaded guilty to various counts of Bank Robbery and Using or Carrying a Firearm during a Crime of Violence in five (5) criminal cases in the United States District Court for the Middle District of Georgia (the "Sentencing Court"). (*See United States v. Luster*, Case Nos. 5:03-cr-00052; 5:03-cr-00098; 5:03-cr-00099; 5:03-cr-00100; and 5:03-cr-00105). On April 1, 2004, Luster was sentenced to an aggregate 535-month term of imprisonment. (*See* ECF No. 44, 47, 80 in *United States v. Luster*, 5:03-cr-52 (M.D. Ga. Sept. 9, 2009). Following a direct appeal, Luster's conviction and sentence

were affirmed by the United States Court of Appeals for the Eleventh Circuit on January 10, 2005. (*See* ECF No. 56 in *United States v. Luster*, 5:03-cr-52 (M.D. Ga. Feb. 9, 2005)).

In addition to his direct appeal, Luster previously has filed at least five unsuccessful motions with the Sentencing Court pursuant to 28 U.S.C. § 2255 attacking the legality of his conviction and sentence. *See Luster v. Oddo*, No. 5:17-cv-264, 2017 WL 3821468, at *1 (M.D. Ga. Aug. 31, 2017) (summarizing Luster's various challenges to his conviction and sentence). Luster also has filed multiple motions with the Court of Appeals for the Eleventh Circuit seeking leave to file a second or successive § 2255 action, *see id.*, as well as at least two Petitions for Writ of Habeas Corpus attacking his convictions in the United States District Court for the Middle District of Georgia and the United States District Court for the Middle District of Pennsylvania. (*See* Case Nos. 5:17-cv-00264 (M.D. Ga); 5:17-cv-201 (M.D. Ga); 4:18-cv-763 (M.D. Pa), and 4:18-cv-1059 (M.D. Pa)).

Additionally, after moving to FCI McKean on June 7, 2018[1], Luster filed in this district at least two other habeas petition pursuant to 28 U.S.C. § 2241, which challenged: 1) the Bureau of Prisons' ("BOP") scheduling of payments according to the Inmate Financial Responsibility Program ("IFRP") as unlawful; and 2) the legality of his conviction and sentence under 18 U.S.C. § 924(c)(3)(B) based upon the decision of the United States Supreme Court in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). *See* Case Nos. 18-160 (dismissed) and 18-339 (still pending). In addition, on January 18, 2019, Luster filed in one of those pending cases an "Addendum to 2241

[1] Luster has been housed at FCI McKean since June 7, 2018. Assuming he receives all good conduct time available to him pursuant to 18 U.S.C. § 3624(b), Luster's projected release date is June 22, 2043. (*See* Ex. 1, Declaration of Ondreya Barksdale, Attachment A, Public Information Inmate Data).

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2018

Actual Innocence Claim." (Case No. 18-339, ECF. No. 9). In that Addendum, Luster argued that the newly-enacted First Step Act clarified 18 U.S.C. § 924(c)(1)(C) in such a way as to provide him with retroactive relief.

On January 1, 2019, Luster filed the instant habeas petition. (ECF No. 1). On May 6, 2019, Luster filed a document titled "§ 2241 Actual Innocence Claim of Sentence and Commitment [sic] is Void."[2] (ECF. No. 9). In these filings, Luster raises the same arguments he previously raised in his myriad prior motions and petitions. (ECF No. 1, at ¶ 13; *see generally* ECF No. 9). Specifically, Luster claims once again that he is entitled to relief under the First Step Act, and that his convictions under § 924(c) as well as the Sentencing Court's order of restitution are "null and void" because he is "actually innocent" of a "crime of violence." (*Id.*). For the reasons stated below, the Court lacks jurisdiction over both these claims and the Petition should be transferred to the Sentencing Court for further adjudication.

ARGUMENT

I. This Court Lacks Jurisdiction Over Petitioner's Claims.

It is well established that claims attacking one's conviction or sentence generally must be presented to the sentencing court by a motion under 28 U.S.C. § 2255. *See Okereke v. United States*, 307 F.3d 117, 120 (3d Cir. 2002); *In re Dorsainvil*, 119 F.3d 245, 249 (3d Cir. 1997); *Russell v. Martinez*, 325 F. App'x 45, 47 (3d Cir. 2009) ("a section 2255 motion filed in the sentencing court is the presumptive means for a federal prisoner to challenge the validity of a conviction or sentence"). By contrast, § 2241 "confers habeas jurisdiction to hear the petition of a federal prisoner who is challenging not the validity but the execution of his sentence." *McGee*

[2] Luster filed the identical "§ 2241 Actual Innocence Claim" in the other habeas matters pending before this Court. *See* Case Nos. 18-160 and 18-339.

v. Martinez, 627 F.3d 933, 935 (3d Cir. 2010). However, while § 2255 generally prohibits an inmate from attacking a conviction and sentence pursuant to § 2241, it sets forth a very narrow exception commonly known as the "savings clause." *Dorsainvil*, 119 F.3d at 249. The "savings clause" states as follows:

> [a]n application for a writ of habeas corpus in [sic] behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is ***inadequate or ineffective*** to test the legality of his detention.

28 U.S.C. § 2255(e) (emphasis added).

The Third Circuit has construed the "savings clause" very narrowly. *Dorsainvil*, 119 F.3d at 251. Specifically, pursuant to *Dorsainvil*, a federal prisoner confined within the Third Circuit has access to § 2241 only when he meets his burden on two points. *Bruce v. Warden Lewisburg USP*, 868 F.3d 170, 177 (3d Cir. 2017). "First, a prisoner must assert a 'claim of 'actual innocence' on the theory' that 'he is being detained for conduct that has subsequently been rendered non-criminal by an intervening Supreme Court decision' and our own precedent construing an intervening Supreme Court decision'—in other words, when there is a change in statutory case law that applies retroactively in cases on collateral review." *Id.* (quoting *United States v. Tyler*, 732 F.3d 241, 246 (3d Cir. 2013)). Second, the petitioner must establish that he "has had no earlier opportunity to test the legality of his detention since the intervening Supreme Court decision issued." *Id.*

Luster cannot make this showing. As noted above, Luster claims that he is entitled to relief under the First Step Act. The First Step Act was signed into law on December 21, 2018. *See* Statement by the President, 2018 WL 6715861, at *1. Among other things, the First Step Act

amended the language of 18 U.S.C. § 924(c)(1)(C) by striking "second or subsequent conviction under this subsection" and inserting "violation of this subsection that occurs after a prior conviction under this subsection has become final." First Step Act of 2018 § 403(a), Pub. L. 115-391, 132 Stat. 5194, 5221–22 (2018). Essentially, the amendment eliminates the procedure of stacking multiple § 924(c) charges in the same indictment to qualify for the 25-year mandatory minimum for a second or subsequent conviction under § 924(c)(1)(C)(i). Under the old version of the statute, which was applicable at the time of Luster's conviction and sentence, a defendant could be convicted of multiple § 924(c) charges at the same time, resulting in higher mandatory minimum penalties for each subsequent count, even if he had no prior § 924(c) convictions. Under the amended statute, the enhanced mandatory minimum applies only if the prior qualifying § 924(c) conviction was final under a prior conviction.

Here, because Luster was sentenced under the old version of the statute, his conviction for his first § 924(c) charge at Count 2s could qualify as a predicate conviction for the second § 924(c) charge at Count 4s, triggering the mandatory minimum penalties under § 924(c)(1)(C)(i). (*See* ECF No. 80 in *United States v. Luster*, 5:03-cr-52 (M.D. Ga. Sept. 9, 2009)). Luster contends that, because of the change in the law, he is entitled to relief in the form of a sentence reduction. (*See* ECF No. 1, at ¶ 15). However, Luster is not entitled to such relief because the First Step Act's amendment to the § 924(c)(1)(C), on its face, does not apply retroactively to his criminal case. First Step Act of 2018 § 403(b), 132 Stat. 5222 ("This section, and the amendments made by this section, shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment.").[3] Because

[3] In his document titled "§ 2241 Actual Innocence Claim," Luster appears to seize on the word "clarification" in the heading of Section 403 of the First Step Act, to suggest that Congress always

the change in substantive law does not apply retroactively to Luster's case, Luster cannot show that "he is being detained for conduct that has subsequently been rendered non-criminal by an intervening Supreme Court decision." *See, e.g., Mickles v. United States*, No. 6:19-cv-060-CHB, 2019 WL 1995329, at *3 (E.D. Ky. May 6, 2019) ("[B]ecause the relevant provision of the First Step Act does not apply retroactively, it necessarily does not provide an intervening change in statutory law . . . such that he may proceed under 28 U.S.C. § 2241."). Furthermore, even if Luster were entitled to relief under the First Step Act, such relief could be provided by the Sentencing Court pursuant to 18 U.S.C. § 3582(c), and thus § 2255 is neither inadequate nor ineffective. For these reasons, Luster cannot bring his claim under the First Step Act pursuant to § 2241.

Likewise, Luster's claim that he is "actually innocent" of violating 18 U.S.C. § 924(c) also does not fall within § 2255's "safety valve clause." In the document titled "§ 2241 Actual Innocence Claim of Sentence and Commitment [sic] is Void" (ECF. Nos. 9)[4], Luster relies on the

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meant for Section 924(c) to apply to final offenses and so the amendment effectively is retroactive. That argument fails for several reasons. First, it is axiomatic that the heading of a section cannot be interpreted to change or limit a statute's plain language. The Supreme Court has long followed "the wise rule that the title of a statute and the heading of a section cannot limit the plain meaning of the text." *Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519, 528–29 (1947); *see also In re Gettig Techs., Inc.*, No. 1:05-BK-06044-MDF, 2016 WL 836992, at *2 (Bankr. M.D. Pa. Mar. 2, 2016) ("[T]he title of a statute . . . cannot limit the plain meaning of the text.") (*Pa. Dept. of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998)). Here, as noted above, the plain language of Section 403 of the First Step Act provides that the section does not apply retroactively, and its heading does nothing to alter this plain language. Furthermore, the Congress in 2018 cannot dictate what a different Congress decades ago meant in drafting a statutory provision. "[T]he views of one Congress as to the construction of a statute adopted many years before by another Congress have 'very little, if any, significance.'" *United States v. Southwestern Cable Co.*, 392 U.S. 157, 170 (1968) (citations omitted).

[4] Notably, Luster does not cite in his Petition to "an intervening Supreme Court decision" that renders his conduct non-criminal. *Bruce*, 868 F.3d at 180. Rather, in his Petition, Luster appears to rely on two out-of-Circuit cases decided *before* he was convicted – *United States v. Henson*, 945 F.2d 430 (1st Cir. 1991) and *United States v. Hopkins*, 703 F.2d 1102 (9th Cir. 1983).

Supreme Court opinion, *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), to argue that the residual clause of the definition of "crime of violence" in 18 U.S.C. § 924(c)(3)(B)—like the residual clause in 18 U.S.C.A. § 16(b)—is unconstitutionally vague. Notably, it is not clear from the Petition whether Luster was sentenced under the residual clause of § 924(c) and thus Respondent takes no position as to whether he qualifies for relief under *Dimaya*. The Court need not reach the merits of Luster's claim, however, because Luster cannot show that § 2255 is "inadequate or ineffective to test the legality of his detention." That is, because *Dimaya* "establishes a new rule of constitutional law"—as § 2255(h)(2) requires[5]—Luster may request permission from the Court of Appeals for the Eleventh Circuit to file a second or successive motion under § 2255(h) challenging his conviction based on that decision.[6] Accordingly, as several courts in this Circuit have held, § 2241 is not the appropriate vehicle to pursue a *Dimaya*-based claim, because these are "precisely the type of constitutional claim[s] that can be pursued in a second or successive § 2255 motion." *See Rosello, v. Warden*, FCI-Allenwood, 735 F. App'x 766, 768, n.5. (3d Cir. 2018); *Trevino v. United States*, No. 4:18-CV-1937, 2018 WL 5437741, at *3 (M.D. Pa. Oct. 29, 2018) ("In light of the Third Circuit's recent determination that § 2241 was not the appropriate vehicle to pursue a

[5] A second or successive § 2255 motion must be based on "newly discovered evidence" or "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255(h).

[6] On June 24, 2019, the United States Supreme Court issued its opinion in the case, *United States v. Davis, et al.*, No. 18-431, holding that 18 U.S.C. § 924(c)(3)(B)'s definition of a "crime of violence," is in fact unconstitutionally vague, as Luster argues. Nevertheless, even if Luster amends his petition to cite to *Davis,* this Court would not have jurisdiction over that claim. *Davis*, like *Dimaya,* is a constitutional (rather than statutory) decision. Thus, to the extent that Luster was sentenced under § 924(c)'s residual clause, Luster may request permission from the Court of Appeals for the Eleventh Circuit to file a second or successive motion under § 2255(h) challenging his conviction under *Davis*. Because § 2255 provides Luster with an adequate avenue to challenge his conviction under *Davis*, his claim does not fall within the narrow "savings clause."

Dimaya claim and Trevino's failure to present this Court with any authority to support a determination that any federal court has held that a *Dimaya* based claim such as the one presently raised may be pursued via a § 2241 proceeding, habeas corpus review is not appropriate.").[7]

For these reasons, Luster cannot show that § 2255 is either inadequate or ineffective and thus this Court lacks jurisdiction over his claims.

II. This Court Should Transfer this Case to the Sentencing Court.

When a district court lacks jurisdiction over a case, it can, "in the interest of justice, transfer such action . . . to any other court . . . in which the action or appeal could have been brought at the time it was filed[.]" 28 U.S.C. § 1631. As discussed above, this Court lacks jurisdiction over Luster's § 2241 petition, which challenges the validity of Luster's sentence in light of the recently-enacted First Step Act and raises an actual innocence claim under *Dimaya*. Because such claims must be presented to the Sentencing Court pursuant to 28 U.S.C. § 2255 and/or 18 U.S.C. §

[7] Notably, the District Court in the Middle District of Pennsylvania recently dismissed a habeas petition filed by Luster raising these same *Dimaya*-based arguments, finding that it lacked jurisdiction over the petition. *See Luster v. White*, No. 4:18-CV-1059, 2018 WL 2981333, at *2 (M.D. Pa. June 14, 2018) ("Given the above decisions, especially the Third Circuit's recent determination that § 2241 is not the appropriate vehicle to pursue a *Dimaya* claim, and Luster's failure to present this Court with any authority to support a determination that any federal court has held that a *Dimaya* based claim such as the one presently raised may be pursued via a § 2241 proceeding, habeas corpus review is not appropriate here.").

3582(c), Respondent respectfully requests that this Court, in the interest of justice, transfer this case to the Sentencing Court for further disposition.

CONCLUSION

Accordingly, for the foregoing reasons, this Court lacks jurisdiction over Luster's Petition for Writ of Habeas Corpus and the Petition should be transferred to the United States District Court for the Middle District of Georgia.

Respectfully submitted,

SCOTT W. BRADY
United States Attorney

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Appendix C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-2098

DAVID ANTOINE LUSTER,
Appellant

v.

WARDEN MCKEAN FCI

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil Action No. 1-19-cv-00012)

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, and PHIPPS, Circuit Judges

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the

circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ Theodore A. McKee
Circuit Judge

Date: March 8, 2021
Tmm/cc: David Antoine Luster
Laura S. Irwin, Esq.

Additional material from this filing is available in the Clerk's Office.